No. 100.

Supp. Brf. of Hill & Harris for Appt.

100

THE VIRGINIA AND ALABAMA COAL COMPANY

Filed Dec. 9, 1897.

THE CENTRAL RAILROAD AND BANKING COMPANY.

SUPPLEMENTAL BRIEF FOR APPELLANT.

I.

The order appointing receivers of the Central provided for the payment of the debts of this class.

A temporary receiver was appointed on March 4, 1892, and the hearing was had before Judges Pardee and Speer on March 28, 1892, at which time the court passed the following order:

"E. P. Alexander, heretofore appointed temporary receiver of this court, shall immediately turn over to the receivers hereby appointed all and singular the assets of the Central Railroad and Banking Company of Georgia in his hands, and all obligations and liabilities, whether arising *ex contractu* or *ex delicto*, which may have been incurred by him in the administration of the trust confided to him in this cause, and **all accounts for current expenses due by the said Central Railroad and Banking Company of Georgia, including claims for personal injury and freight claims, and all such other accounts and claims as are usually settled from day to day in the ordinary course of business shall be assumed and discharged in the regular course by the receivers hereby appointed.**" (Record, p. 7.)

Petitioner's counsel state (Brief, p. 31) that "the court did not pass any order at the inception of the receivership for the payment of creditors of this class."

The Central had been operated by the Danville since June, 1891, and the foregoing order would be without meaning unless it referred to the current debts due by the Central arising under that operation.

II.

Appellants' pleadings and the prayers thereof adequately present their claim as supply creditors for coal delivered and consumed prior to the receivership.

The receivers, as well as the railroad companies, were made parties to both interventions.

The Virginia Company's prayer is "that the court decree that said defendants are, jointly and severally, liable to intervenor for said sum of $26,607.44, and that they *be decreed to pay said sum*, besides interest, to intervenor," and for "such other and further relief as the nature of the case may require" (p. 35). The prayers cannot properly be limited to the railroad companies, because on that construction there would have been no object in making the receivers parties.

It was not necessary to set out the proposition of law that the supply creditor was entitled to a preference. It was sufficient to allege facts bringing the claim within the equity

rule and the order of the court directing payment. The petitions, with the exhibits, certainly do this.

In *Wood vs. New York & N. E. R. Co.*, 70 *Fed. Rep.*, 741–746, it was held sufficient to allege "that said supplies were necessary to the operation, from day to day, of said railroad." In the Virginia Company's petition the allegation is, "Said coal was bought and actually used for the benefit of the Central Railroad Company in the operation of its machinery and the prosecution of its business" (p. 34). In the Sloss Company's petition it is alleged "the coal was purchased for its (the Central's) use and actually used by it in the necessary operation of said road and in the exercise of the obligations and duties to the public imposed upon it by its charter and by the law" (p. 153).

In *Finance Co. vs. Charleston, C. & C. R. Co.*, 62 *F. R.*, 205–209; 10 *C. C. A.*, 323, the court say:

"The petition was sufficient and the relief awarded, being consistent with the case made, was *grantable under the prayer of general relief.*"

The prayer that the receivers pay for the coal on the bins as an *operating expense* of the receivership and have priority as such did not waive or affect the right of the supply creditor to payment for the other portion of the claim under the equity rule or the order of the court.

The contention that the prayers are inadequate was not made in the circuit court. If intended to be urged it should have been made in that court, where, if necessary, an amendment would have been allowable. (*Neales vs. Neales*, 9 *Wall.*, 1.)

"The substance of right is more important than the science of statement."

III.

The evidence that the contract was made specifically in the name and on behalf of the Central was admitted without objection.

See Ryan's testimony, page 94 *et seq.* As the defendants in the court below did not urge the objection of variance, the allegation in the pleading does not control the question; but the decree in case should be based upon all the facts, as they are before the court without objection.

IV.

The trustee of the mortgage creditor was made a party at an early stage of the cause, and consented to the receivership.

It is true, as stated in the brief for petitioners, that the foreclosure suit was begun by the trustee January 23, 1893; but the trustee appeared by counsel on July 1, 1892, and "assented to the continuance of the receivership." (Record, p. 9.)

This consent was given after the Central railroad had filed its dependent bill, alleging its insolvency and praying the court to administer the property for the benefit of all interested. (Record, p. 9.)

V.

The right of intervenors to retake by attachment the coal on the bins or to rescind the contract when all the facts were ascertained and recover such coal was defeated by the consumption of the coal by the receiver.

The conduct of the receiver in continuing to receive the cars of coal which continued to arrive after his appointment, to wit, during the months of March, April, May, and even as late as June (p. 140), justified the intervenors in the belief that the contract would be adopted by the receiver and settlement made under it.

The order of the court directing the receivers to pay current expenses, etc., due by the Central (p. 7) warranted intervenors in the assumption that their debt would be paid, and in failing to move promptly for the issue of an attachment by leave of the court or for rescision.

The Code of Georgia provides for an "attachment for purchase-money," as follows:

SEC. 4539. Process of attachment may issue in behalf of any creditor whose debt is created by the purchase of property, upon such debt becoming due, when the debtor who created such debt is in possession of some of the property for the purchase of which the debt was created, or has sold and is not in possession of a part of said property, and has not been paid for the same, or where said property is in possession of any one holding the same for the benefit of said debtor, or in fraud against such creditor; and judgments on such attachments shall take rank from the date of the levy of the attachment.

SEC. 4540. Before process of attachment shall issue under the preceding section the party seeking the attachment, his agent or attorney-at-law, shall make affidavit before some person authorized by law to issue attachments that the debtor has placed himself in the position mentioned in said section, and also the amount of the debt claimed to be due, and shall also describe in the affidavit the property for which the debt was created. When the affidavit is made by the agent or attorney-at-law he may swear that the amount claimed to be due is due according to the best of his knowledge or belief. The officer issuing the attachment, before issuing the same, shall take from the party seeking the attachment a bond in double the amount claimed to be due, conditioned and made payable as attachment bonds are required to be conditioned and made payable.

SEC. 4541. Affidavit being thus made and bond given, it shall be the duty of the officer before whom such affidavit is made, to issue an attachment against the defendant, which shall be levied only on the property described in said affidavit, by the officer to whom the attachment is directed; or, any officer in this State who is authorized, may issue a summons of garnishment requiring any third party who may have purchased from defendant any part of the same property which the plaintiff sold the defendant, to answer what he may owe the defendant in attachment for any part of the property described in the plaintiff's affidavit, without requiring other or additional bond to be given by plaintiff.

VI.

The controverted statements in appellant's brief are not deemed material, but are believed to be correct.

1. The parenthesis objected to appears in the stipulation on page 51, to which appellant's brief refers. We claim nothing under the parenthesis.

2. When the receiver was applied for the lawfulness of the lease was not even asserted.

This is controverted and reference made to Record, top of page 5, where the full language is that the Central, in its answer to the bill, stated "that it had, *up to that time*, continued in good faith to assert the legality and validity of the lease."

"Up to that time" was up to the time when the receiver was applied for. At that time, "in view of the disclaimers filed by said (Danville and Pacific) companies, [the Central] submits to the jurisdiction of the court the course it shall pursue in reference to said contract of lease," etc. (p. 5).

Then, it seems to us to be true that "when the receiver was applied for the lawfulness of the lease was not even asserted."

Counsel for the Central in the court below appear to have denied the lease or its validity. (Exceptions to master's report, p. 187.)

It is proper to state that the counsel actively representing the Central in the court below and in the circuit court of appeals are not the same counsel who prepared the brief for petitioners in this Court.

This also explains the controverted statement relative to the decisions of the circuit court construing the Georgia statute of 1876. (Appellant's Brief, p. 33; Petitioners' Brief, p. 26.)

5. The Pacific Company turned the Central property over to the Danville "without a syllable of writing."

The answer of the Pacific Company showed that it had been leased to the Danville since 1888, since which time it had done no business as a common carrier, but "on or about the 1st day of June (1891) it *requested* the Danville Com-

pany to assume the control and management of the property of the Central Company, with which request the Danville Company complied" (p. 4). It is not stated in the record that this "request" was in writing. It is a fair inference to be made in argument that if any writing was entered into, it would have been so stated. The language of appellant's brief on this point is the language of the circuit court in a decision on an intervention in the same litigation (p. 28).

VII.

The definition of betterments in petitioners' brief is too restricted.

Rapalje & Lawrence's Law Dictionary gives the following:

"1. Improvements made upon an estate by the occupant or possessor, such as building, draining, fencing, etc., more extensive in character than mere repairs.

"2. The increase in value of an estate by reason of some public improvement thereon."

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